NEPA Call-In
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FACT SHEET

AUGUST 1998

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

What's Inside . . .

Introduction

The U.S. has experienced countless environmental incidents involving hazardous substances, such as used chemicals and processed wastes. Love Canal for example, a neighborhood in Niagara Falls, New York, was used as a chemical dump site for an estimated 21,000 to 22,000 tons of highly toxic chemical waste from 1942 to 1953 by the Hooker Chemicals and Plastic Company. Although Love Canal's water, soil, and air were heavily contaminated with hazardous wastes, the company sold the dump site to the local Board of Education for $1, on the condition of relieving itself from any future liability incurred because of the waste. By 1978, health problems in residents led New York state officials to evacuate 240 families from the area.

Six years later in Bhopal, India, a pesticide producing plant leaked a highly toxic cloud of methylisocyanate (MIC) onto the densely occupied community of 800,000. One third of the town's population were afflicted: 100,000 people received medical treatment and 50,000 were hospitalized. One year later the same chemical (MIC) leaked at a plant run by the same company in Institute, West Virginia. This incident led to a new public awareness in the U.S., heightening concerns for community safety and health.

In response to these problems, Congress created the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980 and the Superfund Amendments & Reauthorization Act (SARA) in 1986. The primary provisions of CERCLA, as amended by SARA, are to:

- Provide authority for cleanup of abandoned or uncontrolled hazardous waste sites,
- Provide emergency response to releases of leaks or spills of hazardous substances,
- Provide a legal framework to identify Potentially Responsible Parties (PRPs) and ensure that the responsible parties pay for the site cleanup, and
- Establish a trust fund for cleanup when no PRPs could be identified. This trust fund is provided for by a tax on the chemical and petroleum industries.

The major provisions of SARA are the Title III requirements, also known as the Emergency Planning and Community Right-to-Know Act (EPCRA). SARA Title III/EPCRA requires manufacturers or users of certain toxic chemicals to report the type and amount of toxic chemicals present at their facilities to EPA, emergency response and spill control teams, and the surrounding community. SARA stressed the importance of permanent remedies in cleaning up hazardous material sites and encouraged greater citizen participation in making decisions on how sites should be cleaned up. SARA also created the Agency for Toxic Substances and Disease Registry (ATSDR), which increased the focus on human health problems posed by hazardous waste sites. ATSDR established and maintains databases of toxicological information, published information on toxicology issues, and prepares public health assessments at Superfund sites.

EPA Superfund Sites

CERCLA is commonly known as "Superfund" because of the tax it created on chemical and petroleum industries. The taxes are placed into a trust fund to provide for clean up when no responsible party can be identified. SARA increased the fund to $8.5 billion.

If a site is identified that has the potential to contain hazardous substances it is entered into the U.S. Environmental Protection Agency's (EPA) Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). A Superfund site refers to sites placed on the EPA's National Priorities List (NPL). Not all sites on CERCLIS that are investigated by EPA are placed on the NPL. This is done, in part, through Hazard Ranking System (HRS) which evaluates and prioritizes the dangers posed by hazardous waste sites. In General, HRS evaluates the amount and type of hazardous substances present, and the potential threat to public health and the environment. Sites that score 28.5 or higher out of a possible 100 points on the HRS are eligible for placement on the NPL. Those sites that do not qualify for the EPA's Superfund program can still be a problem and require clean up by other federal agencies or states. Examples of Superfund sites are abandoned warehouses, manufacturing facilities, processing plants and landfills.

Superfund Emergency Response

The National Oil and Hazardous Substances Pollution Contingency Plan, commonly called the National Contingency Plan (NCP), is found in Title 40 of the Code of Federal Regulations (CFR) Part 300. The NCP contains procedures to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants; provides direction and guidance to investigate and clean-up releases of hazardous substances; protect potential threats to public health, protect and restore the environment, and inform and include the public its decision-making process. When a hazardous substance is released to the environment, there are three types of responses under CERCLA and the NCP:

(1) Time-Critical Removal Actions address releases requiring immediate action. Short term actions may include the removal of hazardous materials, providing safe drinking water to nearby residents, evacuation of residents, preventing contact with hazardous substances by installing fences, and assessing the need for long-term action.

(2) Non-Time-Critical Remedial Actions address hazardous substances that are serious, but do not pose an immediate threat to public health or the environment. The major steps are: conducting a Preliminary Assessment/Site Investigation to confirm the presence of hazardous substances, conducing a detailed Remedial Investigation of site contamination, preparing a Feasibility Study (FS) to determine the most appropriate cleanup method or technology, preparing a Proposed Plan and Record of Decision which are reviewed by the community, preparing Remedial Design/ Remedial Action plans, and conducting the actual site cleanup.

(3) Natural Resources Damage Assessment (NRDA). This is a process by which resource management agencies determine damage to natural resources from a CERCLA site and collect restoration funds from the responsible parties.

GSA Responsibilities Under CERCLA

CERCLA Section 120 requires Federal agencies like GSA to notify buyers of real property of any hazardous substance that may have been stored on the property for one year or more or known to have been released or disposed of on the property. The agency must include the type, quantity and time the hazardous substance was stored, released, or disposed. CERCLA also requires Federal agencies to place in the deed a statement that all remedial action necessary to protect human health and the environment has been taken prior to the date of transfer, and any additional remedial action found to be necessary after the date of transfer will be conducted by the Federal government.

Avoiding CERCLA Liability

As stated earlier, those sites that do not qualify for the EPA's Superfund program can still require clean up by other federal agencies. CERCLA places the liability for cleanup of hazardous substances on the parties responsible for contamination, including the property owner or the party that controlled the site at the time of contamination. Liability for cleanup also extends to a party that acquires the site *after* it became contaminated. Therefore, if GSA ac-

quires a contaminated site, it could be held liable for cleanup of the site.

Since hazardous waste site cleanups can be very expensive and take years to complete, environmental concerns have become an important factor in property acquisition. A Phase I Environmental Site Assessment (ESA) is an important action real estate purchasers like GSA can take to learn about the property's past use, the environmental conditions at the site and adjoining sites, and the likely presence of hazardous substances. Armed with this knowledge, the prospective purchaser can better assess the financial risk posed by potential environmental contamination, take steps to avoid full or partial liability for cleaning up the property, demand that the current landowner clean up the property prior to the sale, or have the cost of the property reduced commensurate with the cost of the clean up activities.

Phase I ESAs involve: records review; performing a site visit; interviewing owners, occupants and local government officials; and must be conducted by a trained and experienced environmental professional. If the Phase I ESA determines that hazardous substances may be present, a Phase II ESA is usually conducted to confirm the presence or extent of contamination. This is accomplished through the collection and analyses of samples.

If environmental contamination is later discovered on the property, the fact that an ESA was conducted helps the purchaser establish the "innocent landowner" defense. Under CERCLA, the property owner is liable for site cleanup unless it can establish that at the time of purchasing the property, they exercised "due diligence" to learn if hazardous substances were disposed of on the property. The most common practice is the American Society of Testing and Materials (ASTM) Standard E 1527/ 1528, Standard Practice for Environmental Site Assessments.

In addition, because a Phase I ESA includes reviews of local government files and interviews, adequate lead time is important. Waiting until the last minute can hinder the quality of work performed and thus increase risk.

ESAs and NEPA

The purpose of a Phase I ESA is to identify the site's recognized environmental conditions which resulted from past actions. As such, a Phase I ESA does not meet the requirements of the National Environmental Policy Act (NEPA) for Federal agencies to consider the environmental impacts of planned or future actions and decisions. However, ESAs should be coordinated with NEPA and cultural resources assessment, if they are to be performed. The potential presence of hazardous substances and their impact should be considered by GSA when a NEPA analysis is performed.

Integrating NEPA and CERCLA Analysis

Since Congress did not specifically exempt CERCLA investigation and remediation activities from NEPA compliance, agencies must determine the level of NEPA analysis required. There are three levels of NEPA analysis: Categorical Exclusions, Environmental Assessment (EA) or Environmental Impact Statement (EIS). Actions that normally do not require the preparation of an EA or an EIS are called Categorical Exclusions (CATEX). To qualify as a CATEX, the proposed action must demonstrate no significant impacts on the environment. GSA uses two types of CATEXs:

(1) The "Automatic" CATEX are types of actions that experience has shown never pose a significant impact to the quality of the human environment. Some CERCLA site investigation activities are an Automatic CATEX. For example, CATEX 5.3(h) in the PBS NEPA Desk Guide lists "Site characterization studies and environmental monitoring, including siting, construction, operation, and dismantling or closing of characterization and monitoring devices."

(2) The "Checklist" CATEX are types of actions that require completion of a checklist to ensure no extraordinary circumstances exist. For example, CATEX question C asks: "Is your action likely to result in the use, storage, release and/or disposal of toxic, hazardous, or radioactive materials, or in the exposure of people to such materials?" Replying to the question requires GSA to consider if the action involves a site that contains underground storage tanks (USTs), or if the action involves construction on or near an active or abandoned toxic, hazardous or radioactive materials generation, storage, transportation or disposal facility.

More intrusive CERCLA activities, such as Feasibility Studies or actual site cleanups require additional NEPA analysis in the form of an EA or EIS. EAs are shorter than an EIS and identify potential environmental impacts to determine if an EIS is necessary. Since the Council on Environ-

mental Quality (CEQ) regulations on implementation of NEPA encourage agencies to combine environmental documents, agencies should consider methods to incorporate the NEPA and CERCLA analysis. Title 40 CFR Part 1506.4, "Combining documents," states: "Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." Combining NEPA and CERCLA documents will likely reduce project costs through coordinating data collection and by eliminating redundant pubic involvement activities and human health and ecological assessments.

The U.S. Department of Energy (DOE) has recently completed a guidance document on integrating the requirements of NEPA and CERCLA for its cleanup efforts at DOE's Savannah River Site, a nuclear weapons production facility that now faces significant environmental cleanup needs. The DOE guidance outlines the process to develop an environmental document that would meet the requirements of both NEPA and CERCLA where CERCLA is clearly the driver. The DOE guidance recommends preparing a "NEPA Values Impact Assessment" (VIA) that is of appropriate detail to satisfy EA or EIS requirements, including an evaluation of the impacts of each CERCLA alternative in a bounding-type assessment. The NEPA VIA replaces the need for an EA or EIS and covers only those values that are not adequately addressed by a CERCLA document (such as a Feasibility Study). Examples of NEPA values not covered by the CERCLA and included in the NEPA VIA are socioeconomic factors; Threatened and Endangered Species; Archeological, Cultural and Historic issues; Transportation impacts; Environmental Justice; and Cumulative Impacts.

The NEPA VIA is incorporated into the CERCLA document by reference. In this way, the NEPA VIA satisfies NEPA requirements, is used as a reference in the CERCLA decision, and does not hinder the CERCLA regulatory review and approval process.

Conclusions

CERCLA authorizes Federal and state agencies to investigate and cleanup hazardous waste sites, and places the liability for the cleanup on the parties responsible for contamination. Liability for cleanup also extends to a party that acquires the site *after* it became contaminated. Therefore, if GSA acquires a contaminated site, it could be held liable for the cleanup. Since CERCLA investigation and cleanups can be very expensive, especially sites on the EPA's National Priorities Lists, environmental concerns are an important factor in property acquisition. A Phase I ESA is an important protective action GSA real estate professionals can take to learn about the environmental conditions of a site. ESAs should be coordinated with NEPA and cultural resources assessment, if they are to be performed.

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Printed on Recycled Paper

Fact Sheet
TI -312 - August1998

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